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 13 and the Plaintiff Classes

14
UNITED STATES DISTRICT COURT
 15
NORTHERN DISTRICT OF CALIFORNIA
 16
OAKLAND DIVISION

17 JAMI ZUCCHERO, individually, and on
 18 behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 HEIRLOOM ROSES, INC.,

22 Defendant.

23 **Case No. 4:22-cv-00068-KAW**

24 **CLASS ACTION**

25 **NOTICE OF MOTION; MEMORANDUM
 26 OF POINTS AND AUTHORITIES IN
 27 SUPPORT OF PLAINTIFF'S MOTION
 28 FOR AN ORDER:**

- 29 (1) GRANTING FINAL APPROVAL OF
 30 CLASS ACTION SETTLEMENT;
- 31 (2) AWARDING ATTORNEYS' FEES AND
 32 COSTS TO CLASS COUNSEL;
- 33 (3) AWARDING A SERVICE AWARD TO
 34 THE REPRESENTATIVE
 35 PLAINTIFF; AND
- 36 (4) AWARDING REIMBURSEMENT OF
 37 SETTLEMENT ADMINISTRATION
 38 COSTS

39 Date: **May 2, 2024**

40 Time: **1:30 p.m.**

41 Dept.: **10B**

42 Judge: **Hon. Kandis A. Westmore**

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS

HEREBY GIVEN that, on May 2, 2024 at 1:30 p.m., or as soon thereafter as the matter may be heard in Department 10B of the above-entitled Court, located at 1301 Clay Street, Oakland, California 94612, Representative Plaintiff Jami Zuccherio (“Plaintiff” or “Class Representative”) will and hereby does apply to this Court for an Order:

1. Granting final approval of the class action settlement agreement;
2. Awarding attorneys' fees and costs to Class Counsel;
3. Awarding a service award to the Representative Plaintiff; and
4. Awarding reimbursement of settlement administration fees and costs.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Laura Van Note in Support of Plaintiff's Motion for Final Approval¹ and exhibits thereto, the Declaration of Jami Zucchero, and the Declaration of Carole Thompson (CPT Group), the complete files and records of this action and any oral argument and documentary evidence as may be presented to the Court at the hearing of this Motion.

Dated: March 18, 2024

COLE & VAN NOTE

By: /s/ Laura Grace Van Note
Laura Van Note, Esq.

Attorneys for Representative Plaintiff and the Plaintiff Classes

¹ The Declaration of Laura Van Note, Esq. shall hereafter be cited as "Van Note Decl."

STATEMENT OF ISSUES TO BE DECIDED

Pursuant to the Local Rules of Practice in Civil Proceedings before the United States District Court for the Northern District of California, Rule 7-4(a)(3), Plaintiff asks the Court to rule on the following issues:

1. Whether the proposed Settlement is fair, adequate and reasonable and merits final approval;
2. Whether the Notice program achieved effective notification to Class Members as to the terms of the Settlement and their rights thereunder;
3. Whether Class Counsel should be awarded attorneys' fees and costs;
4. Whether Representative Plaintiff should receive an Enhancement/Service Award;
5. Whether the Settlement Administrators' fees and costs should be reimbursed; and
6. Whether to enter the Proposed Order Finally Approving the Settlement, directing the issuance of payment of claims and setting forth remaining deadlines.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL HISTORY

In December 2021, Defendant Heirloom Roses, Inc. (“Heirloom” or “Defendant”) began sending notice to 52,206 individuals whose personally identifiable information was potentially accessed when third-party cybercriminals placed malicious code on Defendant’s website. The information potentially accessed included names and payment card information.

Plaintiff filed this case in January 2022 alleging (i) Negligence, (ii) Invasion of Privacy, (iii) Breach of Confidence, (iv) Violation of the Information Practices Act of 1977, (v) Breach of Implied Contract, (vi) Breach of the Implied Covenant of Good Faith and Fair Dealing, (vii) Violations under the California Unfair Competition Law, and (viii) Unjust Enrichment. Following two motions to dismiss, Plaintiff's claims were narrowed to claims for (i) Negligence and (ii) Breach of Implied Contract.

After two rounds of motions on the pleadings, informal exchange of key information and an extensive Settlement negotiation process lasting several months, the Parties have reached a proposed claims-made Settlement that provides make-whole recovery through payment of up to \$200 for each Class Member. Moreover, the Settlement further requires Defendant to improve data security and customer service practices. Taken together, these monetary and non-monetary benefits represent a strong recovery when viewed in comparison to what could be achieved through trial *before* taking into the account the significant risk, cost and delay of continued litigation.

On August 25, 2023, Representative Plaintiff filed her Motion for Preliminary Approval of the Class Action Settlement. Representative Plaintiff finalized filing all Supplemental materials in support of her Motion on November 20, 2023. This Court granted Preliminary Approval on November 30, 2023. At that time, this Court also preliminarily approved the proposed Class Notice (Settlement Agreement [hereafter “SA”] **Exhibit B**) and the Notice dissemination program; Cole & Van Note as Class Counsel; Jami Zuccheri as the Class Representative; a service award for the Class Representative; and CPT Group as the claims administrator. A copy of that Order has been posted on the claims administration website (www.heirloomrosesettlement.com) for public viewing. The hearing date of May 2, 2024 was thereupon set for final approval of the settlement

1 and as the opportunity for Class Members—should any have an objection to, seek clarification of,
 2 or otherwise raise questions in connection with the settlement—to be heard.

3 Finally, as alluded to above, on December 22, 2023, the Class Notice was disseminated.
 4 Only one Class Member filed an objection and only one opted out, demonstrating tremendous
 5 support for this settlement. As a result of the successful notice campaign, the compendium of
 6 information available to the Parties and their counsel, and Class Counsel's and Class Members'
 7 support for this settlement as fair and reasonable, it now merits final approval.

8

9 **II. SUMMARY OF SETTLEMENT AND NOTICE PROCESS**

10 Under the preliminarily approved Settlement Agreement, Defendant will pay a
 11 Reimbursement Award of up to \$200 per Class Member for unreimbursed, unauthorized charges
 12 or out-of-pocket expenses proximately cause by the Data Breach for a limited release of Class
 13 Members' claims: only those claims actually alleged in the Action or that could have been alleged
 14 based on the facts stated in the operative Complaint,² consistent with principles of *res judicata*.
 15 See, *Rangel v. PLS Check Cashers of California, Inc.*, 899 F.3d 1106, 1110-11 (9th Cir. 2018); SA
 16 § X.A. Further key terms include:

17 ***Class Definition.*** The Settlement Class includes all individuals within the United States
 18 whose names and personal payment card information was potentially exposed to unauthorized
 19 third parties as a result of Defendant's Data Security Incident that occurred between approximately
 20 February to October of 2021. Excluded from the Settlement Class is any judge presiding over the
 21 Litigation and their first-degree relatives, judicial staff and persons who timely and validly request
 22 exclusion from the Settlement Class. S.A. § 1.34.

23 ***Attorneys' Fees and Costs.*** The settlement provides for an attorneys' fees and costs award

24

25

26

27

28 ² The Representative Plaintiffs also agreed to a § 1542 release of all potential claims (whether pled or not). SA § X.B.

1 of up to \$198,500. S.A. § 9.1.³ Counsel has devoted numerous hours to and faced significant risks⁴
 2 in the matter's prosecution and, more importantly, made an extraordinary fund available to a large
 3 number of individuals, totaling 524.80 hours expended and \$6,133.48 in unreimbursed costs. Van
 4 Note Decl. ¶ 33. Noteably, this amount does not account for additional future expenses in
 5 overseeing the settlement process, making appearances, filing court documents, ensuring claims
 6 administration compliance with this Court's orders, etc. Van Note Decl. ¶ 34.

7 **Service Award.** The Settlement also provides for a Service Award to Representative
 8 Plaintiff of \$1,500 for her time, risk and effort in bringing this lawsuit, representing the large class,
 9 and in consideration for the claims released.⁵ S.A. § 9.2. The proposed service payment is also
 10 reasonable given the minimal impact this amount will have on any settling Class Member's level
 11 of recovery.

12 **Settlement Administration Costs.** The settlement administration costs are not to exceed

13
 14 ³ California state courts, the Ninth Circuit and the United States Supreme Court are in agreement
 15 that awarding attorneys' fees as a percentage of the common fund is the proper method. *Laffitte v.*
Robert Half Internat. Inc., 1 Cal. 5th 480, 503 (2016) ("the court may determine the amount of a
 16 reasonable fee by choosing an appropriate percentage of the fund created"); *Serrano v. Priest*, 20
Cal. 3d 25 (1977); *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229
F.3d 1249, 1256 (9th Cir. 2000); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (in common fund
 17 cases, fees are not assessed against the unsuccessful litigant (a.k.a. "**fee shifting**"), but rather, taken
 18 from the fund or damage recovery (a.k.a. "**fee spreading**")). In fact, the United States Supreme
 19 Court has always computed common fund fee awards on a percentage of the fund basis. *Boeing*
Co. v. Van Gemert, 444 U.S. 472 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939);
Central Railroad & Banking Co. of Georgia v. Pettus, 113 U.S. 116 (1885). *Contrast, Hanlon v.*
Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998) (the lodestar approach, enhanced by a
 20 multiplier, can be used as an alternative to the common fund theory when "there is no way to gauge
 21 the net value of the settlement or any percentage thereof."); *Vizcaino v. Microsoft Corp.*, 290 F.3d
 22 1043, 1050 & n.5 (9th Cir. 2002) ("[I]t is widely recognized that the lodestar method creates
 23 incentives for counsel to expend more hours than may be necessary on litigating a case so as to
 24 recover a reasonable fee, since the lodestar method does not reward early settlement.").

25 ⁴ Notably, post-judgment, Class Counsel will be required, *inter alia*, to stay in contact with the
 26 claims administrator to ensure payment of the settlement proceeds to all Class Members, to
 27 communicate with the Class Members themselves and other attorneys, and report compliance with
 28 the terms of the Court's final approval order. Attorney fee awards in common funds cases are,
 thus, intended to compensate class counsel for work performed both before and after the date of
 judgment.

⁵ See, Declaration of the Representative Plaintiff, submitted herewith.

1 \$40,000—a reasonable amount given the size of the Class and the work required to send the Notice,
 2 process settlement payments, establish and update a settlement website and communicate
 3 extensively with Class Members and Class Counsel.

4 ***Results of the Notice Process.*** In accordance with the Court’s grant of preliminary
 5 approval, the Settlement Administrator sent the Notices by first class mail to all Class Members at
 6 their last known addresses, updated using the National Change of Address (“NCOA”) Database.
 7 As detailed below, when Notices were returned by the post office, the claims administrator
 8 researched further, performed “skip traces” and then, when possible, re-mailed those Notices to
 9 better mailing addresses. Challenges to the Notice process were non-existent. The Claims Deadline
 10 is March 21, 2024, and Plaintiff’s Counsel shall submit a supplemental declaration by the Claims
 11 Administrator totaling the final numbers after the deadline has passed. Van Note Decl. ¶ 22.

12 ***Distribution to Class.*** Each Settlement Class Member who submits a valid and timely
 13 claim form will be entitled to a disbursement under the Settlement. The distribution was outlined
 14 in the Notices and Claims Form already approved by this Court.

15 ***Effective Date.*** The Effective Date of the Settlement means the occurrence of all the
 16 following events: (a) the Settlement is approved by the Court, (b) the Court has entered a Final
 17 Approval Order and Judgment, and (c) the time to appeal or seek permission to appeal from the
 18 Final Approval Order and Judgement has expired, or, if appealed, the appeal has been dismissed
 19 in its entirety, or the Final Approval Order and Judgement has been affirm in its entirety by the
 20 court of last resort to which such appeal may be taken and such dismissal or affirmance has become
 21 no longer subject to further appeal or review. SA §§ III.1.13-14.

22 ***Funding.*** No later than thirty days after the Effective Date, Defendant shall provide the
 23 Claims Administrator with the funds necessary to effectuate the Settlement. SA § III.1.17. The
 24 Claims Administrator will send funds electronically (in an electronic payment format
 25 recommended by the Claims Administrator and agreed upon by the Parties, such as PayPal or
 26 Venmo) for Approved Claims within the later of 30 days after the Effective Date or 30 days after
 27 all disputed claims have been resolved. If a Settlement Class Member cannot or chooses not to
 28 receive funds electronically, award checks shall be sent by U.S.P.S. Mail. Award checks

1 (electronic and paper) shall be valid for a period of 180 days from issuance and shall state in words
 2 or substance that the check must be cashed within 180 days, at which point it will become void.
 3 Should a settlement check become void, the Settlement Class Member will forfeit the right of
 4 payment. SA § III.7.6. Within twenty days of the Effective Date and following receipt of a W-9
 5 from both Settlement Class Counsel and Representative Plaintiff, Defendant shall fund the
 6 attorneys' costs and reimbursement award. SA § III.2.2.

7

8 **III. THE SETTLEMENT MERITS FINAL APPROVAL**

9 When evaluating a class action settlement under California Code of Civil Procedure § 382
 10 for final approval, a court's inquiry focuses upon whether the settlement is "fair, adequate and
 11 reasonable." *Wershba v. Apple Computer Inc.*, 91 Cal. App. 4th 224, 244-45 (2004); *Dunk v. Ford*
 12 *Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). A settlement is "fair, adequate and reasonable"
 13 and therefore merits final approval when "the interests of the class are better served by the
 14 settlement than by further litigation." *Manual for Complex Litigation* (4th ed. 2008) § 21.61, 462.
 15 These conditions are met here.

16 While the Court possesses "broad discretion" in determining whether a proposed class
 17 action settlement is fair, the Court's inquiry "must be limited to the extent necessary to reach a
 18 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
 19 between, the negotiation Parties, and that the settlement, taken as a whole, is fair, reasonable and
 20 adequate to all concerned." *Dunk*, 48 Cal. App. 4th at 1801 (quoting *Officers for Justice Civil Serv.*
 21 *Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). A court's approval of a class action settlement will
 22 only be reversed for a clear abuse of discretion. *Id.* at 1802.

23 **A. THE SETTLEMENT IS PRESUMED FAIR**

24 "[A] presumption of fairness exists where: (1) the settlement is reached through arm's-
 25 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
 26 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
 27 is small." *Dunk*, 48 Cal. App. 4th at 1802 (citing *Newberg & Conte, Newberg on Class Actions*
 28 (2002) § 11.41, pp. 11-91). Here, the Settlement meets these standards and, as this Court noted in

1 its preliminary approval Order, is presumed fair.

2 The Settlement was reached through arm's-length negotiations. This process included
 3 significant litigation, a mediation session facilitated by a respected mediator with extensive
 4 experience in class actions and, then, additional negotiation thereafter.⁶

5 Class Counsel has vast experience in similar litigation—having handled several hundred
 6 class actions, and hundreds of data breach cases. Finally, of 47,588 Class Members, only one opted
 7 out and one objected.

8 **B. THE RELEVANT CRITERIA SUPPORT FINAL APPROVAL**

9 Courts consider several factors in deciding whether to grant final approval of a class action
 10 settlement, including (1) the amount offered in settlement, (2) the risks inherent in continued
 11 litigation, (3) the complexity, expense, and likely duration of the litigation absent settlement, (4)
 12 the extent of discovery completed and the stage of the proceedings when settlement was reached,
 13 (5) the experience and views of class counsel, and (6) the reaction of class members. *Dunk*, 48 Cal.
 14 App. 4th at 1801; *Wershba*, 91 Cal. App. 4th at 244-45; *Kullar*, 168 Cal. App. 4th at 119. Here,
 15 evaluation on each of these factors favors final approval of the Settlement.

16 **1. The Settlement's Value and Risks of Litigation Favor Final Approval**

17 When evaluating the Settlement for fairness, the Court should weigh the immediacy and
 18 certainty of substantial settlement proceeds against the risks inherent in continued litigation. In
 19 making a fairness determination, “[t]he most important factor is the strength of the case for plaintiff
 20 on the merits, balanced against the amount offered in settlement.” *Kullar*, 168 Cal. App. 4th at 12.
 21 This analysis often includes a comparison of the amount of the proposed settlement with the value
 22 of the damages potentially recoverable if successful in further litigation, appropriately discounted
 23 for the risk of not prevailing. *Dunk*, 48 Cal. App. 4th at 1801-02. As this Court has previously
 24 determined, the Settlement is appropriate under the *Dunk/Kullar* analysis.

25 *a. Summary of Investigation and Information Exchanged*

26 Class Counsel conducted an extensive investigation into the Data Incident. Class Counsel

27 ⁶ Indeed, in *Kullar*, the California Court of Appeal agreed that trial courts should give
 28 considerable weight to the competency of counsel and the involvement of a neutral mediator.
Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116, 129 (2008).

1 first had to understand Defendant’s business and how individuals may have been impacted by the
2 Data Breach. Class Counsel next had to investigate Defendant’s response to the Data Breach. Prior
3 to the first mediation, the Parties engaged in informal discovery concerning the size of the
4 Settlement Class, the nature of the information at issue and the cause of the Data Incident.

b. Summary of Settlement Negotiations

6 The Parties engaged in a full-day mediation session with experienced mediator John Bates
7 of JAMS on April 24, 2023. Van Note Decl. ¶ 9. The Settlement Agreement and accompanying
8 papers required additional time to draft and prepare. *Id.*

c. Summary of Class Counsel's Experience and Prior Cases

10 Counsel has extensive experience prosecuting and defending class actions, including data
11 breaches. Van Note Decl. ¶¶ 24-29; **Exhibit B.** Counsel for Defendant is experienced defending
12 class actions. This enabled the Parties to negotiate a fair, reasonable and adequate settlement.

d. Risks, Expenses, and Complexity if Settlement is Not Approved

14 The risk, expense and complexity of further litigation is significant. Defendant would likely
15 move for summary judgment on multiple grounds. Even if Plaintiff defeated Defendant’s motion,
16 Defendant would certainly oppose class certification and there is a risk Plaintiff would lose at class
17 certification. Moreover, data breach cases present unique challenges. If the case were to proceed
18 without settlement, there would be considerable expense from expert reports and numerous factual
19 and legal arguments regarding liability, damages and injunctive relief, without any guarantee of
20 relief for the Class. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 317 (N.D. Cal. 2018)
21 (“Courts have noted that legal uncertainty supports approval of a settlement.”).

22 Other practical risks support the settlement. Specifically, Defendant is a small business
23 which grows and sells roses. The Class is receiving the full amount Defendant is able to pay.

e. Summary of Risks to Maintain Class Status

25 There is also substantial risk in Plaintiff obtaining and maintaining class certification. Class
26 certification outside the settlement context poses a significant challenge. *Adkins v. Facebook, Inc.*,
27 424 F. Supp. 3d 686 (N.D. Cal. 2019) (denying motion to certify a class under Rule 23(b)(3); *In
28 re Anthem*, 327 F.R.D. at 318.

Even if the Court certified the Class, the risk of decertification is great because data breach litigation is constantly “evolving” and thus “there is no guarantee of the ultimate result.” *Yvonne Mart Fox v. Iowa Health Sys.*, No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *14 (W.D. Wis. Mar. 4, 2021); *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430, at *3 (D. Colo. Dec. 16, 2019).

f. Consideration Received in Exchange for Released Claims

The consideration received in exchange for the release of Settlement Class Members' claims is appropriate given the strength and weaknesses of Plaintiff's claims and the risks of continued litigation, described above. First, the release only applies to claims related to the Data Incident and releases any and all claims related to or arising from the Data Incident.⁷ SA § III.1.29. The relief available is significant given the risks Plaintiff and the Class faced. Under the Settlement, Heirloom agrees to pay all valid and timely claims submitted by Settlement Class Members, provide up to \$500,000 in injunctive relief, pay the costs of administering the Settlement Fund and reasonable fees of the Settlement Administrator, pay Class Counsel's Attorneys' Fees and Costs not to exceed \$198,500 and pay a Service Award for the Representative Plaintiff.

Plaintiff will seek a Service Award of \$1,500, subject to Court approval. Class Counsel will also move the Court for an award of Plaintiff's attorneys' fees and costs in an amount not to exceed \$198,500.

2. The Complexity, Expense and Duration Support Approval

In evaluating for fairness, the Court should weigh the benefits of settlement against the expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). As California jurists have recognized, there exists “an overriding public policy favoring settlement of class actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037, 1054 (2003) (citing *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the compromise and settlement of disputes”)).

⁷ The descriptions of the release herein are meant only as descriptions and are not meant to change or modify the scope of the release or released claims as contained in the Settlement Agreement, which control.

1 As with most complex litigation, data breach class action certification rarely ends with a
 2 certification ruling. Class action defendants may seek a writ of mandate from an order granting
 3 class certification. *See*, Cal. Code Civ. Proc. § 904.1; *In re Cipro Cases I and II*, 121 Cal. App. 4th
 4 402, 409 (2004), and subsequent decertification is often sought. Moreover, the losing party often
 5 takes an appeal after disposition of liability and/or damages. Even a successful judicial resolution
 6 at the trial court level can be just the beginning of a lengthy, expensive process, stalling payments
 7 to Class Members for years. This judicial purgatory is compounded by the risk of an adverse
 8 appellate ruling.⁸ As such, the risks of continued litigation supports approval of this settlement.

9 **3. The Discovery and Factual Investigation Support Approval**

10 The Settlement comes at a point in the litigation where counsel for both Plaintiff and
 11 Defendant had clear views of the strengths and weaknesses of their respective cases. “[T]he extent
 12 of discovery completed and the stage of the proceedings” are factors courts consider in determining
 13 the fairness, adequacy and reasonableness of a settlement. *Dunk*, 48 Cal. App. 4th at 1794. Class
 14 Counsel conducted extensive pre-filing due diligence and engaged in informal discovery
 15 concerning the size of the Settlement Class, the nature of the information at issue in the Data
 16 Incident and the cause of the Data Incident. Van Note Decl. ¶¶ 12-15.

17 **4. The Experience and Views of Counsel Favor Final Approval**

18 Class Counsel supports the Settlement as fair, reasonable and adequate, and believes it in
 19 the best interest of the Class as a whole.⁹ As discussed above, Class Counsel is intimately familiar
 20 with the litigation, having conducted extensive investigation and negotiation on behalf of the Class.
 21 The endorsement by well-informed and qualified counsel of a settlement as fair, adequate and
 22 reasonable is entitled to significant weight. *Dunk*, 48 Cal. App. 4th at 1802; *Ellis Naval Air Rework*

23
 24 ⁸ *See, e.g., Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (2009) (appellate court reversed an
 25 \$86 million restitution award to a certified class of hourly employees).

26 ⁹ “When approving class action settlements, the court must give considerable weight to class
 27 counsel’s opinions due to counsel’s familiarity with the litigation and its previous experience with
 28 class action lawsuits.” *Alberto v. GMRI, Inc.*, No. CIV. 07-1895 WBS DAD, 2008 WL 4891201,
 at *10 (E.D. Cal. Nov. 12, 2008) (citing *Officers for Justice*, 688 F.2d at 625
 and *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379, 1392
 (D. Ariz. 1989)).

¹ *Facility*, 87 F.R.D. 15 (N.D. Cal. 1980); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 617 (N.D. Cal. 1979).

5. The Class Members' Reaction Favors Final Approval

Finally, when determining if a settlement is reasonable, a court looks to “the reaction of class members to the proposed settlement.” *Dunk*, 48 Cal. App. 4th at 1801. Here, Class Members’ response to the settlement has been favorable, further demonstrating that the Settlement is worthy of final approval. As of filing, there has been only one objection to the Settlement. The objector did not object to the Settlement on its merits, but rather objected on the basis of believing that the Defendant provides a valuable service in selling rare flowers. While understandable, the objection does not reflect the Settlement’s merits. Overall, the reaction to the Settlement has been positive and shows support for the Settlement.

IV. THE COURT-ORDERED NOTICE PROGRAM IS CONSTITUTIONALLY SOUND AND HAS BEEN FULLY IMPLEMENTED

14 The Court has discretion in fashioning an appropriate notice program. Cal. Civ. Code §
15 1781; *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 973-74 (1975). To protect absent class
16 members' rights, the parties must provide the class with the best notice practicable, but due process
17 does not require actual notice to parties who cannot reasonably be identified. *See, Phillips*
18 *Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The Court-approved Notice program met
19 this standard and has now been fully implemented. The Settlement Administrator mailed the
20 Notice Package to the entire class December 22, 2023. The Claims Deadline is March 21, 2024.
21 Plaintiff's Counsel will submit a further declaration by the Claims Administrator after the deadline
22 has passed, indicating the final totals of claims, opt-outs and objections. Van Note Decl. ¶ 22.

24 | V. AN AWARD OF ATTORNEYS' FEES AND COSTS IS APPROPRIATE

25 Public policy promotes approval of fee requests since “[t]he function of an award of
26 attorney’s fees is to encourage the bringing of meritorious...claims which might otherwise be
27 abandoned because of the financial imperatives surrounding the hiring of competent counsel.” *City*
28 *of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (internal quotation marks and citations omitted).

1 Additionally, attorneys' fees are awarded based on the value of the common benefit made available
 2 to the class, regardless of whether the settlement contains a reversion provision. *Williams v. MGM-*
 3 *Pathé Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).

4 Specifically, the Settlement provides for an attorneys' fees and costs award of \$198,500.
 5 As the Court previously heard on November 16, 2023, following the Parties' Supplemental
 6 Briefing, the total value of this Settlement is approximately \$812,600. The proposed fee award
 7 thus compromises of less than 25% of the Settlement's total value. Class Counsel has devoted
 8 numerous hours to and faced significant risk¹⁰ in the prosecution of this matter and, more
 9 importantly, made an extraordinary fund available to a large number of consumers.

10 Class Counsel has invested considerable amounts of time and labor in litigating the Class'
 11 claims. Class Counsel incurred \$261,185.00 in lodestar prosecuting this litigation. Van Note Decl.
 12 ¶ 33. Class Counsel drew on their experience litigating hundreds of complex and class actions
 13 against defendants much like this one¹¹ to minimize wasted effort. Class Counsel's efforts include,
 14 *inter alia*, conducting informal discovery in preparation for mediation, analyzing data for
 15 mediation, engaging in a full day of mediation, preparation of the Settlement Agreement and
 16 exhibits thereto, and drafting the motions for preliminary and final approval.

17

18 **VI. THE PROPOSED SERVICE AWARD**

19 The Settlement further provides for, and Representative Plaintiff now requests, a service
 20 payment of \$1,500. Service awards to representative plaintiffs in class action litigation are
 21 commonplace and are "intended to compensate class representatives for work done on behalf of
 22 the class, to make up for financial or reputational risk undertaken in bringing the action, and,
 23 sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. W.*
 24 *Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Service awards "are intended to advance
 25 public policy by encouraging individuals to come forward and perform their civic duty in

26

27 ¹⁰ Class Counsel undertook this matter solely on a contingent basis, with no guarantee regarding
 28 the potential duration of the litigation or even the ultimate reimbursement of fees or costs.

28 ¹¹ Van Note Decl. **Exhibit B**, Class Counsel's Professional Resume.

1 protecting the rights of the class and to compensate class representatives for their time, effort and
 2 inconvenience ...Federal authority is in accord." *In re California Indirect Purchaser X-Ray Film*
 3 *Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *11 (Alameda Super. Ct. Oct. 22, 1998)
 4 (internal citations omitted).

5 The proposed Service Award is reasonable¹² given the work Representative Plaintiff
 6 performed on behalf of fellow Class Members, the risks she faced and continues to face for
 7 participation in the litigation, and the minimal impact the request will have on the amount of any
 8 Class Member's level of recovery. As detailed in Representative Plaintiff's declaration, submitted
 9 herewith, Representative Plaintiff initiated this action and devoted considerable time thereto.

10

11 **VII. REIMBURSEMENT OF ADMINISTRATION FEES IS APPROPRIATE**

12 Representative Plaintiff respectfully requests approval of CPT Group's settlement
 13 administration costs and fees. By the time of preliminary settlement approval, CPT Group had
 14 submitted a competitive bid of \$40,000—a very reasonable amount given the size of the Class and
 15 the work required to send the Notice, process settlement checks, establish a website and
 16 communicate with Class Members and counsel.

17

18 **VIII. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES**

19 The Court's Preliminary Approval Order analyzed the requirements of California Code of
 20 Civil Procedure § 382, found the requirements satisfied, and certified the Settlement Class. For the
 21 reasons stated in the preliminary approval motion and the Preliminary Approval Order, the Court's
 22 certification of the Settlement Class for settlement purposes only should be affirmed.

23

24 **IX. CONCLUSION**

25 Based upon the foregoing, Representative Plaintiff respectfully requests the Court grant
 26 final approval of the Settlement and approve Class Counsel's application for attorneys' fees and

27 ¹² Indeed, some courts have awarded far higher amounts. *Adewumi v. GHS Interactive Security*
 28 *LLC*, No. 34-2017-00210768-CU-OE-GDS (Sacramento Super. Ct. 2019).

1 costs, the requested Service Awards to the Representative Plaintiffs and reimbursement of the
2 settlement administration costs.

3

4 Dated: March 18, 2024

COLE & VAN NOTE

5

By: /s/ Laura Grace Van Note
Laura Van Note, Esq.

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8 Attorneys for Representative Plaintiff and the
9 Plaintiff Classes

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COLE & VAN NOTE
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TEL: (510) 891-9800

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2024, I caused the foregoing document to be filed with the Clerk of this Court via the Court's CM/ECF system, which will cause a true and correct copy to be served electronically on all counsel of record.

/s/ *Laura Grace Van Note*
Laura Van Note, Esq.

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